

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

LIBERTY NATURAL PRODUCTS, INC.,

No. 3:11-cv-00264-HU

Plaintiff,

OPINION AND  
ORDER

v.

VALERIE HAWK HOFFMAN, SUNRISE  
HERBAL REMEDIES, INC., Dissolved,  
and SAGE ADVICE OF PALM BEACH,  
INC., Dissolved,

Defendants.

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1 HUBEL, Magistrate Judge:

2 Proving once again that "irony is no stranger to the law,"  
3 *United States v. McIntosh*, 380 F.3d 548, 556 n.3 (1st Cir. 2004),  
4 there are eight motions before the Court in this wrongful use of  
5 civil proceedings case: (1) Plaintiff Liberty Natural Products,  
6 Inc.'s ("Plaintiff") motion for leave to file a third amended  
7 complaint; (2) Plaintiff's motion to remand to Clackamas County  
8 Circuit Court; (3) third-party attorney Kevin Bague's ("Bague")  
9 motion to quash a subpoena duces tecum; (4) Plaintiff's motion to  
10 compel answers to interrogatories; (5) Plaintiff's motion to compel  
11 answers to requests for admission; (6) Plaintiff's motion to compel  
12 production of documents; (7) Defendants Valerie Hawk Hoffman  
13 ("Hoffman"), Sunrise Herbal Remedies, Inc. ("Sunrise"), and Sage  
14 Advice of Palm Beach Inc.'s ("Sage Advice") (collectively,  
15 "Defendants") motion for leave to file a supplemental response,  
16 nunc pro tunc; and (8) Plaintiff's motion for imposition of  
17 sanctions pursuant to Federal Rule of Civil Procedure ("Rule")  
18 11(c).

19 The parties have given full consent to adjudication of the  
20 case by a magistrate judge pursuant to 28 U.S.C. § 636(c). Having  
21 reviewed the papers and pleadings submitted by the parties and  
22 having heard oral argument on the pending motions, the Court hereby  
23 ORDERS as follows: (1) Plaintiff's motion (ECF No. 104) to file a  
24 third amended complaint is DENIED; (2) Plaintiff's motion (ECF No.  
25 108) to remand to Clackamas County Circuit Court has been  
26 withdrawn; (3) Bague's motion (ECF No. 114) to quash a subpoena  
27 duces tecum is DENIED; (4) Plaintiff's motion (ECF No. 124) to  
28 compel answers to interrogatories is GRANTED in part and DENIED in

part; (5) Plaintiff's motion (ECF No. 128) to compel answers to requests for admission is DENIED; (6) Plaintiff's motion (ECF No. 137) to compel production of documents is GRANTED in part and DENIED in part; (7) Defendants' motion (ECF No. 150) for leave to file a supplemental response, nunc pro tunc, has been withdrawn; and (8) Plaintiff's motion (ECF No. 152) for sanctions is DENIED.

### ***I. FACTUAL AND PROCEDURAL BACKGROUND***

In November 2008, Defendants prosecuted two breach of contract counterclaims against Plaintiff in Clackamas County Circuit Court. Under the first counterclaim, Defendants sought \$76,400 for allegedly damaged and expired product, and \$300,000 for the alleged resulting loss of business. The second counterclaim sought \$100,000 based on Plaintiff's alleged sale of Defendants' product known as "Chill Out."

In April 2009, Plaintiff obtained a general judgment against Defendants, which stated:

Following closing argument, the court pronounced its judgment in favor of the Plaintiff against the Defendants Valerie Hawk Hoffman, Sunrise Herbal Remedies, Inc. and Sage Advice, Inc., jointly and severally, on its first claim, in the sum of \$67,466.90, with pre-judgment interest thereon as set forth hereafter, together with further judgment in favor of the Plaintiff against the Defendants Valerie Hawk Hoffman, Sunrise Herbal Remedies, Inc. and Sage Advice, Inc., jointly and severally, on its second claim, in the sum \$69,198.20[.]

(Schuster Decl. (Docket No. 35) Ex. 3.)

In August 2009, a supplemental judgment was entered in favor of Plaintiff, which stated:

Plaintiff is entitled to an enhanced prevailing party fee in the sum of \$5,500, per ORS 20.190. The court finds that Defendants against whom judgment was granted herein filed counterclaims and/or defenses that were not objectively reasonable and were filed in an effort to gain leverage in settlement negotiations.

1 The court finds that the same Defendants, through  
 2 Valerie Hoffman, repeatedly offered false testimony and  
 3 exhibits in trial of this matter. The court also finds  
 4 that the Defendants did not act with diligence in trying  
 5 to settle Plaintiff's claims.

6 The court, in awarding attorney fees to the  
 7 Plaintiff under ORS 20.105, finds that the Defendant  
 8 against whom judgment was entered had no objectively  
 9 reasonable basis to counterclaim against Plaintiff for an  
 10 alleged overpayment of Plaintiff's account. The  
 11 Defendants did not raise the alleged overpayment in a  
 12 series of emails between the parties months before trial  
 13 when Plaintiff's account was being discussed. . . .  
 14 Defendant Hoffman at trial fabricated an exhibit to  
 15 support the claim of overpayment and testified falsely  
 16 regarding it.

17 (Schuster Decl. (Docket No. 35) Ex. 4.) Based on the state court's  
 18 findings, judgment was entered against Defendants; however,  
 19 Plaintiff's request that the judgment be entered against  
 20 Defendants' trial counsel, Kevin Brague, was denied.

21 On January 20, 2011, Plaintiff filed the present action  
 22 against Defendants in Clackamas County Circuit Court. Plaintiff  
 23 set forth a single claim for wrongful use of civil proceedings in  
 24 violation of ORS 31.230(1) and sought \$7,058 in damages. On  
 25 February 7, 2011, Plaintiff sought leave to amend its complaint.<sup>1</sup>  
 26 The amended complaint requested consequential damages of \$9,367.69  
 27 and punitive damages of \$200,000 based on the counterclaims that  
 28 Plaintiff argues were wrongfully prosecuted against it.

Defendants timely filed their notice of removal to this Court  
 on March 2, 2011. Soon thereafter, Plaintiff moved to remand the  
 proceeding to Clackamas County Circuit Court. On September 2,  
 2011, Plaintiff's motion to remand was denied because the parties

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<sup>1</sup> "[A] claim for damages for wrongful use of a civil proceeding  
 shall be brought in an original action *after* the proceeding which  
 is the subject matter of the claim is concluded." OR. REV. STAT.  
 31.230(3) (2009) (emphasis added).

1 are of diverse citizenship and the amount in controversy exceeds  
2 \$75,000.

3 On April 11, 2012, Plaintiff's motion for partial summary  
4 judgment on its wrongful use of civil proceedings claim was granted  
5 in part and denied in part. In so holding, this Court declined to  
6 express an opinion as to whether the doctrine of issue preclusion  
7 barred Defendants from asserting they had probable cause to  
8 prosecute their counterclaims in the Clackamas County proceeding,  
9 because (1) the Oregon appellate courts had not addressed whether  
10 findings that arise out of a proceeding under ORS 20.105 should be  
11 given preclusive effect; and (2) substantive treatment of the issue  
12 would be better served by further developing the record of the  
13 Clackamas County proceeding before Judge Maurer. This Court also  
14 rejected Plaintiff's argument that issue preclusion barred  
15 Defendants from revisiting the issue of malice or improper purpose.  
16 Plaintiff had argued that Judge Maurer already spoke on the issue  
17 of malice in awarding attorney fees under ORS 20.105(1), but, as  
18 the April 11, 2012 Opinion and Order makes clear, ORS 20.105(1)  
19 makes no mention of malice.

20 In the months that followed, the parties filed the host of  
21 motions that are now before the Court.

## 22 **II. DISCUSSION**

### 23 **A. Plaintiff's Motion for Leave to File a Third Amended Complaint**

24 Plaintiff moves the Court for an order granting it leave to  
25 file a third amended complaint. Plaintiff's proposed third amended  
26 complaint seeks to (1) add its president, James Dierking  
27 ("Dierking"), as a new party plaintiff; (2) alter the caption of  
28 the complaint to reflect the fact that Hoffman has remarried and

1 adopted the name of Valerie *Holland* Hoffman; (3) add a cause of  
2 action for intentional infliction of emotional distress ("IIED") on  
3 behalf of Dierking; and (4) reduce the request for punitive damages  
4 from \$200,000 to \$100,000.<sup>2</sup>

5 Plaintiff's proposed cause of action for IIED appears to be  
6 predicated upon a theory that Hoffman allegedly attempted to extort  
7 \$91,200 from Plaintiff during the Clackamas County proceeding by  
8 threatening to file regulatory complaints against Plaintiff. Then,  
9 in July 2010, after the termination of the Clackamas County  
10 proceeding, Hoffman began filing various complaints with state and  
11 federal agencies. Hoffman has continued to file such complaints  
12 against Plaintiff during the pendency of this action as well.  
13 Plaintiff's proposed third amended complaint also suggests  
14 Dierking's claim for IIED would be based on Defendants' filing of  
15 the counterclaims that are the subject of its claim for wrongful  
16 use of civil proceedings. Plaintiff "feels that . . . [Hoffman]'s  
17 conduct constitutes an extraordinary and outrageous transgression  
18 of the bounds of socially tolerable conduct." (Pl.'s Mem. Supp.  
19 (ECF No. 105) at 3.)

20 Defendants oppose Plaintiff's motion for leave because "the  
21 parties have proceeded with discovery as well as . . . engaged in  
22 motion practice, including motions for summary judgment . . . [and]  
23 [n]ow, at the 11<sup>th</sup> hour, with the discovery deadline fast  
24 approaching, [P]laintiff seeks to file a [Third] Amended  
25

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26 <sup>2</sup> Originally, Plaintiff also sought to add causes of action  
27 for "outrageous conduct" and violation of the Unlawful Trade  
28 Practices Act ("UTPA"), ORS 646.605 to 646.652. Plaintiff has  
since agreed to drop those claims. (Pl.'s Reply at 2.)

1 Complaint[.]” (Defs.’ Opp’n (ECF No. 112) at 2.) In other words,  
2 Defendants object to Plaintiff filing its motion for leave on July  
3 26, 2012, six days from the close of fact discovery.

4 The Ninth Circuit’s general policy is to permit amendment with  
5 “extreme liberality.” *Simon v. Behavioral Health, Inc.*, 208 F.3d  
6 1073, 1084 (9th Cir. 2000). However, when a district court has  
7 already granted a plaintiff leave to amend, as this Court did on  
8 June 12, 2012, resulting in the second amended complaint being  
9 filed June 14, 2012, its discretion in deciding subsequent motions  
10 to amend is “particularly broad.” *Griggs v. Pace Am. Group, Inc.*,  
11 170 F.3d 877, 879 (9th Cir. 1999). Several factors are taken into  
12 account to assess the propriety of a motion for leave to amend,  
13 such as bad faith, undue delay, prejudice to the opposing party,  
14 and futility of amendment. *Johnson v. Buckley*, 356 F.3d 1067,  
15 1077-78 (9th Cir. 2004).

16 In this case, the addition of Dierking and the claim for IIED  
17 would be based almost exclusively on previously known facts.  
18 Defendants’ filing of counterclaims and Hoffman’s alleged attempt  
19 to extort money from Plaintiff allegedly occurred during the course  
20 of the Clackamas County proceeding, and Hoffman began filing  
21 regulatory complaints in July 2010. Plaintiff’s case has been  
22 pending for over twenty-two months in state and federal court. *Cf.*  
23 *Wade v. County of Sacramento*, 447 F. App’x 842, 843 (9th Cir. 2011)  
24 (“The district court did not abuse its discretion in denying [the  
25 litigant] leave to file a third amended complaint to add  
26 claims . . . based on previously known facts where his case had  
27 been pending for two years.”)

1 Furthermore, Plaintiff made this request shortly before the  
2 close of discovery, even though all of Plaintiff's "new" facts had  
3 been available to Plaintiff and formed the basis to a large extent  
4 of the claim in the complaint for wrongful use of civil  
5 proceedings. *Cf. Chodos v. West Publ'g Co.*, 292 F.3d 992, 1003  
6 (9th Cir. 2002) (affirming denial of leave to amend where litigant  
7 sought to add claim "shortly before the close of discovery" based  
8 on "new" facts that were available to him before the first  
9 amendment to his complaint).

10 During the May 22, 2012 telephonic hearing with the parties,  
11 and after noting that the parties had chosen to proceed with the  
12 initial cross motions for summary judgment before setting a full  
13 case schedule, I inquired as to whether the parties had discussed  
14 a proposed case schedule. Plaintiff's counsel, Phillip Schuster  
15 ("Schuster"), proposed a August 1, 2012 deadline for the close of  
16 fact discovery. Defendants' counsel, William Brandt, ("Brandt"),  
17 agreed to Schuster's proposal during the May 22, 2012 telephonic  
18 hearing. Near the end of the hearing, at 11:15 a.m., I confirmed  
19 this deadline, stating: "I am going to give you today a fact  
20 discovery cut-off of August 1st." Audio recording: Rule 16  
21 Conference in *Liberty Natural Prods., Inc. v. Hoffman, et al.*, held  
22 by Mag. J. Dennis Hubel, (May 22, 2012).<sup>3</sup> Since then, neither  
23 party has requested an extension of the deadline to the close of  
24 fact discovery.

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25  
26 <sup>3</sup> The parties and the Court reconvened on July 2, 2012, to  
27 discuss the case schedule; however, neither party asked for an  
28 extension of the August 1, 2012 deadline for the close of fact  
discovery during the July 2, 2012 continuation of the Rule 16  
conference.



1 Accordingly, Plaintiff's motion for leave to file a third  
2 amended complaint is denied. The Court will leave Hoffman's name  
3 as it is pled and the parties can make any necessary alteration at  
4 the time for the lodging of the pretrial order.

5 ***B. Plaintiff's Motion to Remand to Clackamas County Circuit Court***

6 In the alternative, and in the event its motion for leave to  
7 amend is denied, Plaintiff moved the Court for an order remanding  
8 this proceeding to Clackamas County Circuit Court.

9 Plaintiff's counsel "stipulated to withdraw the motion to  
10 remand" during the November 21, 2012 hearing. (Hr'g Tr. 16, Nov.  
11 21, 2012.)

12 ***C. Bague's Motion to Quash***

13 Plaintiff's wrongful use of civil proceedings claim is based  
14 on Defendants' commencement and prosecution of counterclaims  
15 against it in state court. Defendants' counterclaims originated in  
16 an answer and counterclaims filed by attorney Susan Felstiner in  
17 November 2008. On March 4, 2009, Ms. Felstiner's firm withdrew  
18 from representing Defendants based on non-payment of fees. On  
19 March 10, 2009, attorney Kevin Bague agreed to take over  
20 representation of Defendants after receiving copies of the  
21 pleadings and some documentation from Hoffman, such as a copy of a  
22 summary of business records. The trial commenced on March 25,  
23 2009, 15 days after Bague's appearance in the case, and evidence  
24 was presented in support of Defendants' counterclaims. Judge  
25 Maurer ultimately found "that Defendants against whom judgment was  
26 granted herein filed counterclaims and/or defenses that were not  
27 objectively reasonable and were filed in an effort to gain leverage  
28 in settlement negotiations."

1 On April 11, 2012, in this proceeding, the Court granted  
2 Defendants' motion for leave to amend their answer to add an  
3 affirmative defense of advice of counsel. "Advice of counsel, if  
4 sought in good faith and if given after full disclosure of  
5 information in the possession of the accuser establishes probable  
6 cause as a matter of law," *Hartley v. Water Res. Dept.*, 77 Or.  
7 App. 517, 520 (1986), which, in turn, negates an essential element  
8 of a claim for misuse of civil proceedings. See *Pereira v.*  
9 *Thompson*, 230 Or. App. 640, 674 (2009) (recognizing one element of  
10 a claim for wrongful initiation of a civil proceeding as the  
11 "absence of probable cause to prosecute the action.")

12 Plaintiff does not believe Hoffman sought advice of counsel in  
13 good faith and after a full and frank disclosure of all pertinent  
14 facts. See *Pereira*, 230 Or. App. at 675. Thus, Plaintiff has  
15 asked Bague to produce: (1) "[a]ll correspondence, whether written  
16 or electronic, including letters, e-mail or faxes from Valerie Hawk  
17 Hoffman to Kevin Bague or from Kevin Bague to Valerie Hawk  
18 Hoffman"; (2) "[a]ny written or typed transcriptions of telephone  
19 messages from Valerie Hawk Hoffman"; and (3) "[a]ny documents  
20 supplied to attorney Kevin Bague supporting the two counterclaims  
21 in the Clackamas action, including trial exhibit 120, copies of any  
22 invoices referred to in exhibit 120, copies of any log sheets or  
23 memos concerning notations of purported damaged or adulterated  
24 product delivered to the defendants by" Plaintiff. (Bague Decl.  
25 Ex. 1 at 2-3.) Bague opposes this request on the grounds that  
26 Plaintiff seeks disclosure of attorney-client privileged and  
27 attorney work product documents.

1 The oft-cited § 93 of McCormick on Evidence, which pertains to  
2 communications between a lawyer and client, discusses circumstances  
3 in which the privilege is waived:

4 There are, in addition, a variety of other types of  
5 actions in which the advice of an attorney will sometimes  
6 be relied upon in support of a claim or defense. It has  
7 accordingly become established that if a party interjects  
8 the 'advice of counsel' as an essential element of a  
9 claim or defense, then that party waives the privilege as  
10 to all advice received concerning the same subject  
11 matter. . . . [S]pecific reliance upon the advice either  
12 in pleading or testimony will generally be seen as  
13 waiving the privilege.

14 McCormick, Evidence § 93 (2d ed. 1972); see also *U.S. E.E.O.C. v.*  
15 *American Apparel, Inc.*, 327 Fed. Appx. 11, 13 (9th Cir. 2009)  
16 (noting that "a party may waive both the attorney-client privilege  
17 or work product protection by injecting an issue into the case");  
18 see also *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003)  
19 ("Substantial authority holds the attorney-client privilege to be  
20 impliedly waived where the clients asserts a claim or defense that  
21 places at issue the nature of the privileged material." (citation  
22 omitted)).

23 In this case, Defendants asserted the affirmative defense of  
24 advice of counsel in an amended answer filed on April 26, 2012.  
25 Defendants have therefore waived the privilege as to all  
26 communication and/or advice received concerning the counterclaims  
27 that are at issue here. Such information is imperative to  
28 Plaintiff's ability to challenge Defendants' affirmative defense of  
advice of counsel. Brague's motion to quash is therefore denied on  
this ground.

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1        ***D. Plaintiff's Motion to Compel Answers to Interrogatories***

2        Pursuant to Rule 37(a)(3), Plaintiff moves to compel  
3 Defendants to respond to Interrogatory Nos. 1-9 and 11-17 of its  
4 second set of interrogatories. Plaintiff also seeks its reasonable  
5 attorney fees and costs under Rule 37(a)(5)(A).

6        Rule 37(a)(3)(B) empowers a propounding party to "move for an  
7 order compelling an answer, designation, production, or inspection"  
8 if "a party fails to answer an interrogatory submitted under Rule  
9 33" or "a party fails to respond that an inspection will be  
10 permitted-- or fails to permit inspection-- as requested under Rule  
11 34." FED. R. CIV. P. 37(a)(3)(B). Under Rule 37(a)(4), "an evasive  
12 or incomplete disclosure, answer, or response must be treated as a  
13 failure to disclose, answer, or respond." FED. R. CIV. P. 37(a)(4).

14        As the Ninth Circuit has explained, "broad discretion is  
15 vested in the trial court to permit or deny discovery, and its  
16 decision to deny discovery will not be disturbed except upon the  
17 clearest showing the denial of discovery results in actual and  
18 substantial prejudice to the complaining litigant." *Hallett v.*  
19 *Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (quoting *Goehring v.*  
20 *Brophy*, 94 F.3d 1294, 1305 (9th Cir. 1996)).

21        Interrogatory Nos. 1-9 and 11-17 of Plaintiff's second set of  
22 interrogatories, which were propounded on June 5, 2012, asked  
23 Defendants to:

- 24 •        "Interrogatory No. 1: Identify any knowledge or information  
25 that you had subsequent to your emails of 4-03-2006, that  
26 Liberty Natural Products, Inc. had any incidents with products  
27 involving bug infestation, including the source of the  
28 knowledge, the method by which it was communicated, and the

1 date it was communicated." (Schuster Decl. (ECF No. 127) Ex.  
2 1 at 1.)

3 • "Interrogatory No. 2: List the dates you discovered any bug  
4 infestations in goods that you received from Liberty Natural  
5 Products, Inc., dba Spectrum Botanicals, including the date of  
6 the order, invoice number, a description of the type of  
7 infestation, the quantity of product, size of the product, and  
8 the relative value." (*Id.* at 2.)

9 • "Interrogatory No. 3: Identify the major quality issues known  
10 to you, referred to in Ripoff Report #4025980, including the  
11 date, parties involved, product involved, and resolution of  
12 the quality issues to your knowledge." (*Id.*)

13 • "Interrogatory No. 4: Identify any lawsuits you were aware of  
14 in 2009 that were pending against Liberty Natural Products,  
15 Inc." (*Id.*)

16 • "Interrogatory No. 5: Identify any knowledge you had in March  
17 of 2009 that lawsuits were pending against Liberty, including  
18 the name, media, date, and any details of the lawsuits." (*Id.*)

19 • "Interrogatory No. 6: Identify any knowledge or belief that  
20 you possessed prior to March 18, 2009, of James Dierking  
21 having lied, including the date you learned of the lie, source  
22 of the information, the date of the lie, the media in which  
23 the lie was transmitted and a description of the lie." (*Id.*  
24 at 3.)

25 • "Interrogatory No. 7: Identify any knowledge or information  
26 you possessed prior to March 29, 2009, that supports that  
27 James Dierking 'was an unstable cannon just waiting to blow,'  
28 'is not normal,' including the method by which you obtained

1 the information, the date, and a description of the  
2 information you received." (*Id.*)

3 • "Interrogatory No. 8: Identify any evidence that you possess  
4 that James Dierking committed severe defamation against the  
5 Hoffmans as expressed in ripoffreport.com #425980 dated 3-29-  
6 2009, including any evidence identifying Mr. Dierking as the  
7 poster, and what elements of the posting are untrue." (*Id.*)

8 • "Interrogatory No. 9: Identify your knowledge of any labor  
9 issues that Liberty had, including the original source of the  
10 information, the nature of the labor issue and how you became  
11 aware of the issues." (*Id.* at 4.)

12 • "Interrogatory No. 11: Identify any knowledge that you had in  
13 March, 2009, that James Dierking's wife had 'gone after him,'  
14 including the date and a description of the action." (*Id.*)

15 • "Interrogatory No. 12: Identify any knowledge that you had in  
16 March, 2009, that Jim Dierking or Liberty might have new  
17 regulatory issues, including the source of the information,  
18 the method by which it was received, and the date it was  
19 received." (*Id.*)

20 • "Interrogatory No. 13: Identify any information that you  
21 received or possessed on or before March 29<sup>th</sup>, 2009, which  
22 evidences that Jim Dierking is unprincipled, including the  
23 source, a description of the information, the method by which  
24 you received it, and the date." (*Id.* at 5.)

25 • "Interrogatory No. 14: In regards to Hoffman v. Richardson,  
26 Case# CA11-1303, filed by you in the 7<sup>th</sup> Judicial Circuit, St  
27 Johns County, Florida in 2011, identify all discovery through  
28 which you discovered that Defendant Roger Richardson sold you

1 products that contained insects, including a full description  
2 of the discovery, where it was obtained, when it was obtained,  
3 and how it was obtained." (*Id.*)

4 • "Interrogatory No. 15: Identify any persons or organization  
5 with whom you have discussed bug infestation regarding the  
6 products supplied by Liberty to you, including the name,  
7 approximate dates, and nature of the discussion or information  
8 exchanged." (*Id.*)

9 • "Interrogatory No. 16: Identify any party by name that you  
10 know posted anything regarding Liberty Natural Products, Inc.  
11 on either Topix.com or ripoffreport.com." (*Id.* at 6.)

12 • "Interrogatory No. 17: Identify any personal property held by  
13 you or your spouse in which you have had any interest, use,  
14 occupancy or possession since 11-06-2008, including a  
15 description of the personal property, your use, an estimate of  
16 its value, the owner, and location of the property." (*Id.*)

17 The basis for Defendants' opposition to Plaintiff's motion to  
18 compel answers to Interrogatory Nos. 1-9 and 11-17 is twofold.  
19 First, Defendants argue that Plaintiff is seeking information it  
20 plans to use against Defendants in other jurisdictions, including  
21 its continued efforts to attempt to collect on the judgments  
22 entered in the Clackamas County proceeding. Second, Defendants  
23 argue the information Plaintiff requests has no bearing on the  
24 third (probable cause) and fourth (malice) elements of a wrongful  
25 use of civil proceedings claim (i.e., the elements that this Court  
26 determined precluded the grant of Plaintiff's motion for partial  
27 summary judgment).

1 Plaintiff's motion to compel answers to interrogatories is  
2 granted in part and denied in part. Defendants are ordered to  
3 provide a detailed answer to Interrogatory Nos. 1-3 and 15. I have  
4 cautioned the parties' several times that this case does not  
5 concern the parties litigation in other states, nor does it concern  
6 an action to set aside a fraudulent conveyance and its too soon for  
7 a judgment debtor's exam in this court. However, Interrogatory  
8 Nos. 1-3 and 15 fall outside the scope of the court's admonition  
9 and need to be answered.

10 ***E. Plaintiff's Motion to Compel Answers to Requests for Admission***

11 Pursuant to Rule 36(a)(6), Plaintiff has asked the Court to  
12 determine the sufficiency of Defendants' answers and objections to  
13 Request Nos. 9-18, 20, and 23-51 of its third request for  
14 admissions. See Fed. R. Civ. P. 36(a)(6) ("The requesting party  
15 may move to determine the sufficiency of an answer or objection.  
16 Unless the court finds an objection justified, it must order that  
17 an answer be served. On finding that an answer does not comply  
18 with this rule, the court may order either that the matter is  
19 admitted or that an amended answer be served.")

20 Request Nos. 3, 9-18, 20, and 23-51 of Plaintiff's third  
21 request for admissions asked Defendants to admit:

- 22 • Request No. 3: That you or one of the Defendants purchased a  
23 product labeled Fresh Start from another supplier named Terra  
24 Botanica.
- 25 • Request No. 9: That you caused a report to be published  
26 regarding attorney Tim Vanagas at RipoffReport.com in March  
27 2009.



1 • Request No. 10: That you were a party to a lawsuit involving  
2 a construction contract to build a house at 37 Codfish Hill  
3 Road, Bethel, CT.

4 • Request No. 11: That you have been a representative of Hoffman  
5 and Hawk, LLC.

6 • Request No. 12: That you were a representative of Hoffman and  
7 Hawk Builders, LLC.

8 • Request No. 13: That you were involved with or had an interest  
9 in the Hoffman and Hawk, LLC build order contract for  
10 construction of a new home at 37 Codfish Hill Road, Bethel,  
11 Connecticut.

12 • Request No. 14: That you were involved with and or had an  
13 interest in the Hoffman and Hawk Builder, LLC build order  
14 contract for the construction of a new home at 37 Codfish Hill  
15 Road, Bethel, Connecticut.

16 • Request No. 15: That you or one of your companies has either  
17 received or anticipated receiving remuneration, monies, or  
18 tangible benefit from the sale of 37 Codfish Hill Road,  
19 Bethel, CT.

20 • Request No. 16: That you have been a member of Peaceful  
21 Properties, LLC.

22 • Request No. 17: That you forgave payment of the promissory  
23 note you received for the transfer of your interest in 869  
24 Summer Harbor Road, Winter Harbor, Maine to Peaceful  
25 Properties, LLC after Liberty's recording of its judgment in  
26 Maine in 2009.

27 • Request No. 18: That you or one of your companies has  
28 contributed monetarily or in-kind to the construction and or

1 maintenance and repair and or payment for utilities of 869  
2 Summer Harbor Road, Winter Harbor, Maine after you signed a  
3 deed transferring your interest to Peaceful Properties, LLC in  
4 October 2006.

5 • Request No. 20: That you lived at the 869 Summer Harbor Road,  
6 Winter Harbor, Maine property in the years 2006, 2007, 2008,  
7 2009, 2010.

8 • Request No. 23: That you signed a Connecticut Civil  
9 Investigative Demand stating that David Boyd was a manager and  
10 operator of Sunrise Herbal Remedies, Inc. from 1994 until the  
11 time of the filing of the response in May 2005.

12 • Request No. 24: That the David Boyd you stated was a manager  
13 and operator of Sunrise Herbal Remedies, Inc. in a Connecticut  
14 Civil Investigative Demand response was your husband David  
15 Boyd Hoffman.

16 • Request No. 25: That when you sold Wicked Wick Candles in  
17 January 2009 for \$89,000.00 you stated in an email to the  
18 purchasers that 60% of annual revenues were from existing  
19 customers.

20 • Request No. 26: The Defendants, from October of 2006, when the  
21 amounts owed to Plaintiff began to accrue, to the present,  
22 possessed a financial net worth greater than the amount owing  
23 to pay Plaintiff.

24 • Request No. 27: That you signed as grantor and mortgagor on a  
25 \$250,000.00 open ended credit line from Wachovia bank secured  
26 on 25 Codfish Hill Road, Bethel, Connecticut dated 4-14-2007.

27 • Request No. 28: That in October, 2006, you entered into an  
28 agreement with Roger Richardson that arrearage owing to

1 Spectrum would be paid from the sale proceeds of 35 Codfish  
2 Hill Road, Bethel, Connecticut upon its sale.

3 • Request No. 29: That you received \$16,000.00 deposit on the  
4 purchase of Groovy Smoothy in February 2007.

5 • Request No. 30: That you failed to refund the \$16,000.00  
6 deposit to the Groovy Smooth purchasers named Burke when  
7 informed of their exercise of the rescission provision of the  
8 purchase agreement allowing for a return of their down  
9 payment.

10 • Request No. 31: That you received more than \$195,00.00 from  
11 the sale of an asset called Garden Girl in January of 2006.

12 • Request No. 32: That you or one of the Defendant's or an  
13 entity in which you have an interest or have been involved,  
14 received more than \$155,000.00 for the sale of an asset called  
15 Groovy Smoothy in July 2007.

16 • Request No. 33: That you or one of the Defendant's or an  
17 entity in which you have an interest or have been involved,  
18 received more than \$150,000.00 from the sale of an asset  
19 called Sea of Tea Herbs in April of 2007.

20 • Request No. 34: That you or one of the Defendant's or an  
21 entity in which you have an interest or have been involved,  
22 received more than \$195,000.00 from the sale of an asset  
23 called Green Cuisine Herbs in February 2006.

24 • Request No. 35: That a Rolls Royce titled in the name of  
25 Defendant Valerie Hoffman was sold in December of 2007 for  
26 \$78,900.00.

27 • Request No. 36: That you signed the bill of sale for a Rolls  
28 Royce sold in December 2007 as the owner.

1 • Request No. 37: That on 11-06-2008 you were in title to a  
2 condominium at 2180 Ibis Isle #15, Palm Beach, Florida with an  
3 assessed value of over \$500,000.00, which was unencumbered by  
4 any obligations to any lenders.

5 • Request No. 38: That on 11-06-2008 you were in title to a  
6 condominium at 2180 Ibis Isle #15, Palm Beach, Florida valued  
7 at over \$500,000.00.

8 • Request No. 39: That after 11-06-2008, you, or one of the  
9 Defendants or an entity under your control or in which you  
10 were involved, offered an asset called Get You Goat Soap, for  
11 sale for \$89,000.00.

12 • Request No. 40: That after 11-06-2008, you, or one of the  
13 Defendants, or an entity under your control or in which you  
14 were involved, offered an asset described as a pickle product  
15 line and name Princess Pretty Pickles for sale for  
16 \$157,000.00.

17 • Request No. 41: That after 11-06-2008, you, or one of the  
18 Defendants, or an entity under your control or in which you  
19 were involved, offered for sale an asset named Spice Guy Foods  
20 for more than \$59,000.00.

21 • Request No. 42: That after 11-06-2008, you, or one of the  
22 Defendants, or an entity under your control or in which you  
23 were involved, offered an asset described as Juice Boosts for  
24 sale for more than \$59,000.00.

25 • Request No. 43: That after 11-06-2008, you, or one of the  
26 Defendants, or an entity under your control or in which you  
27 were involved, offered for sale an asset named Backwood Brews  
28 for \$69,000.00.

1 • Request No. 44: That after filing of the Defendants'  
2 counterclaims on 11-06-2008, Defendant Valerie Hoffman caused  
3 to be published on the internet at ripoffreport.com,  
4 statements that Liberty had major product quality problems.

5 • Request No. 45: That you or one of the entities under your  
6 control had the financial resources to either secure or payoff  
7 the arrearage owing to Liberty between October of 2006 and the  
8 time of the Oregon trial in March 2009.

9 • Request No. 46: That you, or one of the Defendants, an entity  
10 under your control elected not to pay Liberty when you had the  
11 financial capacity to do so.

12 • Request No. 47: That you, or one of the Defendants owe former  
13 herbal extract supplier Terra Botanica over \$25,000.00 for  
14 goods shipped which has not been paid.

15 • Request No. 48: That Terra Botanica attempted collection of  
16 the debt and you, or one of the Defendants, elected not to  
17 pay.

18 • Request No. 49: That you are named as beneficiary or heir to  
19 a will.

20 • Request No. 50: That you are named as a beneficiary to a  
21 trust.

22 • Request No. 51: That you did not advise Liberty of labeling  
23 and website regulatory action you or one of the Defendants  
24 were subjected to by the Food and Drug Administration.

25 Defendants did not specifically address Request No. 3 in their  
26 briefing. With respect to Request No. 9, Defendants argue that,  
27 even if Hoffman was responsible for publishing information  
28 regarding Vanagas, it would have no bearing on any of the issues

1 presently before this Court. With respect to Request Nos. 10-18,  
2 20, 24-43, and 45-50, Defendants contend its "answers to these  
3 requests for admissions would not serve any useful purpose in this  
4 litigation because what these requests for admission do is seek to  
5 expand the scope of the litigation as opposed to narrow it."  
6 (Defs.' Opp'n (ECF No. 133) at 9.) With respect to Request No. 23,  
7 Defendants contend that such a "request cannot possibly have any  
8 bearing whatsoever on any issue in this [wrongful use of civil  
9 proceedings] case." (*Id.* at 10.) With respect to Request No. 44,  
10 Defendants argue that whether or not Hoffman published something on  
11 the Internet is not reasonably calculated to lead to evidence would  
12 be admissible at trial either on the issue of liability or punitive  
13 damages. Defendants did not specifically address Request No. 51 in  
14 their moving papers, but the Court notes no apparent relation to  
15 claims in litigation here.

16 Plaintiff's motion to compel answers to these requests for  
17 admission are all denied. Not a single one bears on any issue to  
18 be resolved in the pending claim.

19 ***F. Plaintiff's Motion to Compel Production of Documents***

20 Pursuant to Rule 37, Plaintiff moves the Court for an order  
21 compelling Defendants to comply with Request Nos. 1 and 3-19 of its  
22 second request for production of documents.

23 For the reasons stated on the record at the time of oral  
24 argument, all of which are incorporated herein by reference,  
25 Plaintiff's motion to compel production of documents is granted in  
26 part and denied in part. Defendants must produce (1) *complete*  
27 corporate and individual state and federal tax returns for, at a  
28 minimum, 2007 through 2011; (2) any existing financial statements

1 prepared by, or for, Defendants from November 6, 2008 to the  
2 present; (3) current financial statements which contain or are  
3 verified by a written declaration that they are made under the  
4 penalties of perjury; and (4) any material necessary to complete  
5 the returns for 2005 and 2006 that have already been provided to  
6 Plaintiff. This material will be subject to the protective order  
7 filed contemporaneously herewith.

8 As stated on the record at the time of oral argument,  
9 Defendants must also produce "[a]ll documents, correspondence,  
10 emails, or communications [Defendants] received from  
11 ripoffreport.com" and "[a]ll documents, correspondence, emails or  
12 communications with parties who posted or facilitated the posting  
13 at ripoffreport[.com] against James Dierking or Liberty Natural  
14 Products, Inc.", (Schuster Decl. (ECF No. 140) Ex. 1 at 2), for the  
15 time period of March 2008 to August 2009, to the extent such  
16 material exists in the custody or control of Hoffman or either of  
17 the corporate defendants.

18 ***G. Plaintiff's Motion for Sanctions***

19 Pursuant to Rule 11(c), Plaintiff moves the Court for an order  
20 imposing non-monetary sanctions on the grounds that Defendants have  
21 filed fabricated documents during the course of this litigation.

22 Plaintiff's motion for sanctions concerns (1) Defendants'  
23 counsel's filing of three documents - which were contained in the  
24 file of Hoffman's former attorney, Susan Felstiner - in opposition  
25 to Plaintiff's motion for partial summary judgment; and (2)  
26 Defendants' filing in this case of documents that pertain to the  
27 parties litigation in Florida (i.e., the case concerning alleged  
28

1 libelous statements about Dierking and Plaintiff that were posted  
2 on ripoffreport.com).

3 To the extent Plaintiff's motion for sanctions implicates the  
4 second category of documents, the Court denies the motion as moot  
5 because the Court has been asked by the parties to treat these  
6 documents as withdrawn. To the extent Plaintiff's motion for  
7 sanctions implicates the three documents contained in Susan  
8 Felstiner's file, the motion is denied because these documents were  
9 filed by Defendants' counsel in good faith. See *MTEC, LLC v. Nash*,  
10 No. CV 08-563-AC, 2008 WL 4723483, at \*8 (D. Or. Oct. 20, 2008)  
11 (explaining that "the Court should still not impose [Rule 11]  
12 sanctions, because [the challenged documents] were filed in good  
13 faith.")

### 14 **III. CONCLUSION**

15 Before summarizing the rulings on these motions, which exist  
16 in ridiculous numbers at this point in the history of litigation  
17 between these parties, I pause to reflect on the conduct of the  
18 parties. The courts in the United States are intended to resolve  
19 the disputes between citizens. Looking at the history of  
20 proceeding between these parties, I can find no evidence to support  
21 the notion that either is motivated to resolve their differences  
22 and get on with their lives and businesses. Rather, their  
23 "business plan" seems to be to use the courts to multiply their  
24 disputes and inflict as much turmoil and expense as possible on  
25 each other. This judge will not join, nor participate in their  
26 quest. This court has one case in front of it which will be  
27 resolved despite the best efforts of the parties to prevent that  
28 result. The parties and their lawyers are well advised to focus on



1 the resolution of the claim now before the court efficiently and  
2 expeditiously. Needless distraction from that purpose will not be  
3 tolerated. This warning shot is fired across all your bows to  
4 borrow a naval metaphor.

5 Consistent with the discussion above, Plaintiff's motion (ECF  
6 No. 104) to file a third amended complaint is DENIED; Plaintiff's  
7 motion (ECF No. 108) to remand to Clackamas County Circuit Court  
8 has been withdrawn; Brague's motion to quash a subpoena duces tecum  
9 is DENIED; Plaintiff's motion (ECF No. 124) to compel answers to  
10 interrogatories is GRANTED in part and DENIED in part; Plaintiff's  
11 motion (ECF No. 128) to compel answers to requests for admission is  
12 DENIED; Plaintiff's motion (ECF No. 137) to compel production of  
13 documents is GRANTED in part and DENIED in part; Defendants' motion  
14 (ECF No. 150) for leave to file a supplemental response, nunc pro  
15 tunc, has been withdrawn; and Plaintiff's motion (ECF No. 152) for  
16 sanctions is DENIED.

17 IT IS SO ORDERED.

18 Dated this 8th day of February, 2013.

19 /s/ Dennis J. Hubel

20 \_\_\_\_\_  
21 DENNIS J. HUBEL  
22 United States Magistrate Judge  
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